South Carolina Law Review

Volume 14 | Issue 2 Article 3

Winter 1961

Practice and Procedure

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PRACTICE AND PROCEDURE

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I. INTRODUCTION

Because of the large number of cases decided in the area of practice and procedure, and the wide scope covered by these cases, the authors have divided the cases into three broad fields: pre-trial matters, matters arising during trial, and matters arising on appeal. Each field has been further sub-divided into topics presented by the cases decided. The authors recognize that some cases deal with matters that concern more than one of the broad fields, and consequently such cases have been discussed more than one time. Also, some principles enunciated do not clearly fall within any one sub-division, and with respect to these the authors have discussed the cases under the topic which seems most logical to them.

II. PRE-TRIAL MATTERS

A. *Demurrer*

In order to overrule a demurrer to a declaratory judgment suit, it is only necessary to show a justiciable controversy. Of course, where the complaint has no allegations to show that plaintiff has rights to be adjudicated, the demurrer will be sustained. But where it is shown that plaintiff is entitled to a declaration of his rights, the court should overrule the demurrer. *Plenge v. Russell*[1] involved this principle and arose out of a suit by certain doctors seeking to have certain hospital regulations declared contrary to statutory law and unconstitutional. The defendant hospital demurred, and the circuit court sustained the demurrer, apparently concluding that the regulations were consonant with the statute and constitutional. The Supreme Court reversed, citing the above principles, and holding in effect that the case was decided prematurely.

In *Costas v. Florence Publishing Company*[2] the Court reaffirmed its oft-repeated holding that in passing on a demurrer factual allegations of the complaint are deemed true, although legal conclusions are not. After the demurrer was overruled and while the case was on appeal, the trial judge permitted the plaintiff to amend his complaint. The Supreme Court held this was in error, stating that the judge might

1. Plenge v. Russell, 236 S. C. 473, 115 S. E. 2d 177 (1960).
2. Costas v. Florence Publishing Co., 237 S. C. 655, 118 S. E. 2d 696 (1961).

require a case to be tried where the overruling of the demurrer was on appeal if the ends of justice required it, but that principle was not involved in this case, since the judge only permitted an amendment.

B. *Venue*

The often confusing subject of venue was the subject of several cases in the Supreme Court's 1960 term. In *Seegars v. WIS-TV*[3] the Court discussed the phrase "transacting business" within the meaning of the rule that a domestic corporation must own property and transact business within a county in order to be subject to suit in that county. There, the defendant WIS-TV owned property in Kershaw, and affidavits of plaintiff in opposition to defendant's motion to change venue to Richland showed that defendant had carried advertisements of Kershaw County firms over its television programs. The circuit judge ordered the venue changed. The Supreme Court, noting that the plaintiff's affidavits did not show who, if anyone, solicited the advertisements or how the solicitation, if any, was accomplished, said that the advertisements alone were not enough to prove that defendant "transacted business" in the County and that the circuit judge's finding was "not without evidentiary support." Although Esso Standard Oil Company, which did own property and transact business in Kershaw, had been joined as a defendant, the circuit court held that Esso was "not such a material bona fide defendant as to permit its joinder . . . to deprive . . . WIS-TV of the right to trial in Richland County." This ruling, unappealed from, became the law of the case and was not considered on appeal.

In *Deese v. Williams*[4] the plaintiff joined the South Carolina Highway Department and a resident of another county and sued in plaintiff's county. The individual defendant moved to change the venue, which the circuit judge denied. The court affirmed, saying that the South Carolina Highway Department, a bona fide defendant, could be sued in any county of the State and that the individual defendant had no absolute right to have the venue changed when the Department was joined as a defendant.

3. Seegars v. WIS-TV, 236 S. C. 355, 114 S. E. 2d 502 (1960).
4. Deese v. Williams, 236 S. C. 292, 113 S. E. 2d 823 (1960).

In *Collins v. Collins*[5] the Court interpreted Section 20-106 of the 1952 Code to permit venue for divorce in plaintiff's county where there had been "due diligence" in trying to find defendant in his county and he could not be found. This result seems clearly to be required by the language of the statute.

C. *Discovery*

In an important discovery case, *Wallace v. Timmons*,[6] the Court permitted the receiver of an insurance company to inspect books and papers of a deceased agent in order to obtain relevant evidence in its suit against the widow for premiums collected by the agent during his life. The Court said the movant need only show, prima facie, that he has a cause of action and that the records he seeks contain relevant information. This may be shown by the verified complaint, with or without supporting affidavits. In a strong statement supporting discovery, the Court said, "Hide-and-seek is not a game for the Courts; and discovery under Sections 26-502 and 26-503 is no longer to be regarded as an extraordinary process."[7]

D. *Pleadings*

The form of motions to strike was briefly mentioned in *Kinard v. United Insurance Co. of America*.[8] There, defendant moved to strike all references to benefits under an insurance policy where the action was for fraudulent cancellation of the policy. The Court pointed out that it was not proper for the motion to fail to specify which portions of the complaint defendant wanted to have stricken. But, in considering the case on its merits, the Court held that since the allegations were material to the issues involved, they should not have been stricken.

In *Hunter v. Hyder*[9] the Court stated that the proper function of pleadings is to apprise the adversary of the pleader's theory of the case. In line with that, the Court required the plaintiff in *Seegars v. WIS-TV*[10] to specify the substance

5. Collins v. Collins, 237 S. C. 230, 116 S. E. 2d 839 (1960).
6. Wallace v. Timmons, 237 S. C. 411, 117 S. E. 2d 567 (1960).
7. *Id.* at 117 S. E. 2d 573.
8. Kinard v. United Insurance Co. of America, 237 S. C. 266, 116 S. E. 2d 906 (1960).
9. Hunter v. Hyder, 236 S. C. 378, 114 S. E. 2d 493 (1960).
10. *Supra*, note 3.

of defendant's broadcast alleged to have been defamatory. And in *Hunter*, the Court held that in a suit against a principal it was not necessary to allege that the acts complained of (trespass) were in fact committed by agents of the principal. The Court said that since the answer affirmatively alleged that the persons who may have committed the acts of trespass were independent contractors, the defendant was not surprised and would not have been better informed by clearer allegations in the complaint.

In *Seegars* the Court affirmed an order striking the adjectives "large" and "powerful" in referring to the defendant, permitting "wealthy" to stand since punitive damages were sought. In this case also, the Court held that orders making pleadings more definite and certain were appealable only when the appellant is deprived of some substantial right.

E. *Orders of Reference*

In *Clelland v. Lanham*[11] the Court refused to order a reference in a suit on an account, just because the account and offsets might be long. A long account is not necessarily complicated, and the pleadings did not show that the accounting would be complicated. Ordinarily a case seeking recovery of a specific amount of money is triable by a jury.

III. MATTERS ARISING DURING TRIAL

A. *Use of Testimony in Proceedings at Former Trial*

In *Bennett v. Floyd*,[12] a suit to question the validity of a former partition and judicial sale whereby the heirs (plaintiffs) had been divested of their interest, the plaintiffs introduced the judgment roll in the partition proceeding. The defendant used the judgment roll to establish the fact of the decease of one James Bradshaw prior to the partition. Plaintiffs produced two witnesses who testified he died subsequently to the hearing. These witnesses testified from memory. The Court affirmed the lower court's confirmation of the referee's report which upheld the validty of the sale. The Court stated:

> This testimony is contradicted by that given in the partition proceeding which was to the effect that James

11. Clelland v. Lanham, 236 S. C. 351, 114 S. E. 2d 328 (1960).
12. Bennett v. Floyd, 237 S. C. 64, 115 S. E. 2d 659 (1960).

> Bradshaw died prior to the commencement of the action. The testimony in that proceeding can properly be considered in determining the factual issue now raised. The judgment roll in the partition suit was offered in evidence by the appellants without qualification or restriction. Under these circumstances, it must be treated as admitted generally, as applicable to any issue it tended to prove, and the contents thereof available to either party to this action.[13]

B. *Contempt of Court*

In *State v. Langley*[14] the defendant was held in contempt of court for violating order restraining him from the sale of alcoholic beverages. Defendant appealed, among others, upon the grounds the restraining order was broader than the statute allowed. The Court in upholding the contempt citation quoted *State v. Nathans*:[15]

> The disobedience of any order, judgment or decree of court having jurisdiction to issue it, is a contempt of that court, however erroneous or improvident the issuing of it may have been. Such order is obligatory until reversed by an appellate court, or until corrected or discharged by the court which made it. But if, in making such order, the court was without jurisdiction, disobedience of it is not contempt.[16]

In *Johnson v. S. C. State Hwy. Dept.*,[17] involving condemnation proceedings, the land was offered for viewing by the respondent, Highway Department. No express objection was made by the plaintiff.

The Court held that it was discretionary with the trial judge whether he would allow viewing of the premises under Section 38-202 of the 1952 Code of Laws of South Carolina, and in the absence of abuse of discretion they would not interfere. They said that in any event no real objection had been made.

13. *Id.* at 237 S. C. 72.
14. State v. Langley, 236 S. C. 263, 113 S. E. 2d 786 (1960).
15. State v. Nathans, 49 S. C. 199, 27 S. E. 52 (1896).
16. State v. Langley, 236 S. C. 263, 269 (1960).
17. Johnson v. State Highway Department, 236 S. C. 424, 114 S. E. 2d 591 (1960).

C. *Scintilla Rule*

In *Williams v. Clinton*[18] the Court reiterated and reaffirmed the scintilla rule and rejected the *res ipsa loquitur* rule. The Court quoted from *Waring v. South Carolina Power Co.*:[19]

> The appellant labors under the erroneous idea that the Supreme Court has overruled the pronounced principle, to wit, if there is any relevant testimony, amounting to a scintilla, it must be left to the jury to determine its force and effect. The meaning of this rule is there must be some evidence arising out of the testimony which elucidates the issues of fact and which enables the jury to form an intelligent conclusion. It does not authorize the admission of speculative theoretical or hypothetical views. It does not set aside the rule in this state relating to *res ipsa loquitur*, which doctrine does not prevail in this state. . . . Whilst adhering to the scintilla rule, this Court has recognized a rule supplemental to the scintilla rule which is thus propounded in this case of *National Bank v. Thomas J. Barrett*, 174 S. E. 581. 'If it be conceded there may be deduced by a process of unusual finesse of reasoning that there is a scintilla of evidence . . . nevertheless there is another rule, more founded upon common sense and reason, to the effect that only when one reasonable inference, not just one inference, but one reasonable inference, can be deduced from the evidence, it becomes a question of law for the Court and not a question of fact for the jury.'

He concludes by stating:

> "This declaration is but to say that the scintilla of evidence upon which the case should be sent to the jury must be real material and pertinent and relevant evidence, not speculative and theoretical deductions."

D. *Duty of Parties to Bring Litigation to Timely Trial*

Is there a *duty* upon the defendant to bring litigation to trial? Our Supreme Court in *Thomas & Howard v. Fowler*[20] said "No!"

> The defendants, no less than the plaintiff, had had the *right*, since February, 1955, when the controversies concerning the

18. Williams v. Clinton, 236 S. C. 373, 114 S. E. 2d 490 (1960).
19. Waring v. South Carolina Power Co., 117 S. C. 295, 181 S. E. 1 (1921).
20. Thomas & Howard v. Fowler, 238 S. C. 46, 119 S. E. 2d 591 (1961).

pleadings were concluded, to press for trial; but the *duty* to do so was the plaintiff's, not theirs. While a defendant may bring about an expeditious trial of a case, he has no legal obligation to do so; except to meet such actions as are taken by the plaintiff, he may remain passive. *Schultz v. Schultz*, 1945, 70 Cal. L. C. App. 2d 293, 161 P. 2d 36; *Bock v. Portland Gas & Coke Co.*, 1954, 202 Or. 609, 277 P. 2d 758. 17 AM. JUR., Dismissal, etc., Section 80; 27 C. J. S. Dismissal and Nonsuit § 65(4).

* * *

Nor does the assertion of a counterclaim relieve the plaintiff of the duty to bring the case to trial. In *Wutchumna Water Co. v. Stevenson*, 1928, 204 Cal. 191, 267 P. 537, the court said: "This cause had been allowed to slumber for four years and ten months or over, after the defendant's answer had been filed, without any apparent effort on the part of the plaintiff to bring the matter on for hearing. The fact that the defendant had also appeared, seeking affirmative relief by way of cross-complaint and counterclaim, did not serve to relieve the plaintiff of the duty cast upon it to promptly prosecute its action . . . ."

E. *Discretion of Trial Judge to Grant New Trial for Inadequacy*

In *Fuller v. Bailey*[21] the Court reiterated the fact that it was within the trial judge's discretion whether or not a new trial should be granted for inadequacy. Repeating this well defined rule the Court stated:

> It is now well settled that in actions for torts, a new trial may be granted by the Trial Judge in the exercise of a just and wise judgment, upon the ground that the verdict is grossly inadequate. *DePass v. Broad River Power Company, et al.*, 173 S. C. 387, 176 S. E. 325, 95 A. L. R. 545.

F. *Motion for New Trial on After-Discovered Evidence*

In *Ortowski v. Ortowski*[22] defendant moved for a new trial upon grounds of after-discovered evidence. In affirming the refusal of the trial judge to grant a new trial, the Court laid down once again the five requirements which must be met by the moving party in order to have a new trial on this ground:

21. Fuller v. Bailey, 237 S. C. 573, 118 S. E. 2d 340 (1961).
22. Ortowski v. Ortowski, 237 S. C. 499, 117 S. E. 2d 860 (1961).

> In a motion for a new trial based upon after-discovered evidence, the moving party must show (1) that the evidence is such as will probably change the result if a new trial is granted, (2) that it has been discovered since the trial, (3) that it could not have been discovered before the trial by the exercise of due diligence, (4) that it is material to the issue, and (5) that it is not merely cumulative or impeaching. *McCabe v. Sloan*, 184 S. C. 158, 191 S. E. 905. Such motions are addressed to the sound discretion of the hearing Judge and his refusal will not be interfered with by this Court unless an abuse of discretion amounting to error of law is shown. *Evatt v. Campbell*, 234 S. C. 1, 106 S. E. 2d 447.

G. *Burden of Proof - Circumstantial Evidence*

The *Fuller*[23] case also contains a thorough discussion of the burden and requirements of proof of circumstantial evidence. There is no direct evidence in the record that the appellant was driving the automobile in which the appellee was injured at the time the accident occurred. The appellant contended that there was, therefore, no proof from which it could be reasonably concluded that he was operating the automobile at the critical time. In disposing of this contention, the Court said:

> We think that the physical facts at the scene of the wreck, and the attendant facts and circumstances, which are circumstantial in nature, when considered in the light most favorable to the respondent permit a reasonable inference that the appellant was driving the automobile at the time of the wreck . . . .
>
> * * *
>
> The respondent cites the annotation in 32 A. L. R. 2d 988, upon the subject or proof, in absence of direct testimony by survivors or eyewitnesses, who, among occupants of motor vehicle, was driving it at time of accident. In this annotation we find the following statements: 'That one who was shown to be driving an automobile shortly prior to an accident is presumed to have continued as driver was recognized in *Flick v. Shimer* (1941), 340 Pa. 481, 17 A. (2d) 332, and *Morgan v. Peters* (1942), 148 Pa. Super. 88, 24 S. (2d) 644, both

23. *Supra*, note 21.

set out in para. 2, *supra*, and given effect not only in those cases but in *Claussen v. Johnson's Estate* (1938), 224 Iowa 990, 278 N. W. 297; *Ohio Bell Tel. Co. v. Lung* (1935), 129 Ohio St. 505, 196 N. E. 371; *Renner v. Pennsylvania R. Co.*, (1951 App.) 61 Ohio L. Abs. 298, 103 N. E. (2d) 832; and *Huestis v. Lapham's Estate* (1943), 113 Vt. 191, 32 A. (2d) 115.'

In the case of *Leek v. New South Express Lines*, 192 S. C. 527, 7 S. E. 2d 459, 462, this Court said:

> The rule of criminal law that where circumstantial evidence is relied upon, the facts proved must be such as to preclude every other hypothesis but the guilt of the accused, does not apply in civil cases. In civil actions every other reasonable conclusion need not be excluded; proof of circumstances warranting a given inference is sufficient in such cases. Annotation, 97 Am. St. Rep. 802.
>
> The right to recover on circumstantial evidence for death resulting from another's negligence depends upon the reasonable and logical connection such proof establishes between the death and the negligent act alleged to have caused it. It is incumbent upon the plaintiff in the absence of direct evidence, to show the existence of such circumstances as would justify the inference that the injury which caused the death was due to the wrongful act of the defendant, and not leave the question to mere speculation or conjecture. The facts and circumstances shown should be reckoned with in the light of ordinary experience and such conclusions deduced therefrom as common sense dictates. 16 Am. Jur. Sec. 328, Page 222.

H. *Timely Objections*

The Supreme Court in the case of *Deese v. Williams*[24] was asked to overrule the doctrine of allowing juries to apportion damages between joint tort feasors in South Carolina.

The Court sidestepped this issue and refused to grant a new trial stating that the defendant failed to make a timely objection and thus any irregularity as to the form of the verdict was waived:

24. Deese v. Williams, 237 S. C. 560, 118 S. E. 2d 330 (1961).

> . . . For the purpose of this case, we shall assume that in a suit against several defendants on a joint tort, a jury is not empowered to sever the actual damages and assess each defendant according to the degree of his culpability.
>
> Even in those jurisdictions denying the power of the jury to apportion damages between joint tort-feasors, it is generally held that when a jury does so, the verdict is not void but only erroneous in form. *Whitney v. Tuttle,* 178 Okl. 170, 62 P. 2d 508, 108 A. L. R. 789; *Aitken v. White,* 93 Cal. App. 134, 208 P. 2d 788; 52 AM. JUR., Torts § 123. And when, as here, no objection is made when such a verdict is published and counsel for all parties acquiesce in its form, it is too late to make a complaint after the jury is discharged. By failing to make timely objections, the irregularity in the form of the verdict is waived. . . .

I. *Verdict Contrary to Instruction*

In *Repass & Repass v. King Pontiac,*[25] the Court held that where the jury renders a verdict in plain violation of instructions from the trial judge, that the defendant's, King Pontiac, motion for a new trial should have been granted.

The Court refused to consider the exclusion of other evidence stating that since the case was remanded for a new trial that it was unnecessary to pass on the exclusion of such evidence.

J. *Failure to Charge*

In the case of *Green v. Bolen,*[26] there was some disagreement over the proper rationale for the Court's decision that there was no error committed by the trial judge in refusing a charge requested by appellant. Mr. Justice Moss, speaking for the majority of the Court, found that no error had been committed because the requested charge did not relate to the issues raised by the pleadings and the evidence. The majority opinion cited *DuRant v. Stuckey,* 221 S. C. 342, 70 S. E. 2d 473, to the effect that "sound legal principles, whether embraced in decisions of the Court or statutes, should be charged by a trial judge only when applicable to the case on trial." In

25. Repass & Repass v. King Pontiac, 236 S. C. 363, 114 S. E. 2d 486 (1960).
26. Green v. Bolen, 237 S. C. 1, 115 S. E. 2d 607 (1960).

a separate concurring opinion, Mr. Justice Oxner affirmed on the ground that the charge was not timely having been made after the judge had concluded his instructions to the jury. Furthermore, the subject had been fully discussed by the Court and counsel prior to the commencement of the trial Judge's charge and no request was made by the appellant at that time. In Mr. Justice Oxner's opinion, the charge, although not directly related to the issues raised by the pleadings, was related to matters of common knowledge and that questions as to their applicability might easily arise during the jury's deliberations. Therefore, it would not, in his opinion, have been error to give the requested charge had it been timely made.

IV. MATTERS ARISING ON APPEAL

A. *Law of the Case*

In *Jones v. Southern Railway Co.*[27] the jury had awarded $35,000.00 actual damages to the plaintiff. The trial judge granted a new trial *nisi* unless the plaintiff should consent to a remittitur of $10,000.00, which he did. Upon appeal by the defendant, the Supreme Court reversed, finding as a matter of law that the plaintiff was barred from recovery by his own contributory negligence. The accident had occurred when the plaintiff struck the side of one of defendant's trains at a crossing. The trial judge ruled the crossing statute inapplicable because of the distance that the engine had proceeded beyond the crossing at the time that the collision occurred.[28] The ruling was not challenged and was, therefore, the law of the case. As a result, simple contributory negligence on the part of the plaintiff defeated recovery. The Court sets forth in the body of its opinion an admirable list and distinguishment of the many South Carolina crossing cases.

B. *Scope of Review*

In *Lee v. Lee*[29] the Supreme Court affirmed the judgment of the lower court granting a divorce to the plaintiff on grounds of adultery. The matter had been determined by him without reference. The court wisely restrained the scope of its review, recognizing the advantages which a trial judge, who has heard and seen the witnesses has in the making of

27. 238 S. C. 27, 118 S. E. 2d 880 (1961).
28. CODE OF LAWS OF SOUTH CAROLINA, Section 58-743 (1952).
29. 237 S. C. 532, 118 S. E. 2d 171 (1961).

factual determinations. In reviewing equity cases, the reviewing court should not undertake a *de novo* review of the evidence, but rather should place upon the appellant the burden of convincing it that the trial judge erred in his findings of fact.[30]

The case does raise two interesting and perplexing points. First, does the rule set forth above apply only in cases where the crucial issue is the credibility to be given to testimony? The principal case suggests this to be the rule,[31] and it must be admitted that the trial judge is at his greatest advantage when he must pick and choose between conflicting statements by witnesses. Any lawyer, however, who has experienced the great difference between the impression derived from and actual trial and the cold printed record or transcript of that same testimony, will readily admit that the trial judge also has an advantage in the added depths of meaning that testimony takes on by reason of its being colored by facial expressions, gestures, etc. This is also a reason for restraint in review, even in cases that do not directly invoke questions of credibility.

Finally, it should be noted that this case involved a charge of adultery, which even in actions for divorce requires clear and positive proof by the preponderance of the evidence.[32] This higher standard of proof should not, it seems, affect the permissible scope of review and in the principal case the court implicitly accepts this fact.

In *Mitchell v. Smyser*[33] the Court was presented with a case more novel in its facts than in its law. The factual question for determination by the court below was "who was the lawful wife of Wellington Perkins . . . ." The Master and Circuit Judge had concluded in favor of the respondent's predecessor in interest. Characterizing the question as one of law, the Court affirmed the decision below, stating that it was "not at liberty to pass on conflicting evidence except . . . for the purpose of determining whether or not there is any evidence warranting the factual conclusions reached by the Circuit Judge."

30. *Inabinet v. Inabinet*, 236 S. C. 52, 113 S. E. 2d 66 (1960).
31. *Evalt v. Campbell*, 234 S. C. 1, 106 S. E. 2d 447 (1959); *Meyerson v. Malinaw*, 231 S. C. 14, 97 S. E. 2d 88, 65 A. L. R. 2d 194 (1957).
32. *Brown v. Brown*, 215 S. C. 502, 56 S. E. 2d 330, 15 A. L. R. 2d 163 (1949).
33. 236 S. C. 332, 114 S. E. 2d 226 (1960).

The Supreme Court noted in three cases that it must review the evidence in the light most favorable to the respondent when an appeal is taken from the trial judge's refusal to grant a nonsuit, directed verdict, judgment n. o. v. or alternatively a new trial.[34] In both cases, the Court noted that where there are conflicts in evidence or where more than one reasonable inference can be drawn from the evidence, the case must be submitted to the jury. Such questions as whether a party is guilty of contributory negligence or whose act proximately caused an injury are ordinarily for the jury and rarely become a question of law for the court. One line of cases wherein contributory negligence has been held to be a question of law is in those instances where there has been an admission of facts by the guilty party himself that establishes contributory negligence.[35]

The "Two-Court" Rule in equity cases was repeated by the Court in the case of *Galphin v. Wells*.[36] "In such matters where issues of fact are found by the Master (Referee) and concurred in by the Circuit Judge, the factual findings will not be disturbed unless such findings are without evidence to support them or are against the clear preponderance thereof."[37] It is sometimes erroneously assumed that this rule confers upon factual findings agreed upon by a referee and circuit judge the same limited review that prevails with regard to jury determinations. The Court does not apply the rule in this restrictive fashion, but undertakes a more extensive review than would be permissible under South Carolina's so-called "scintilla" rule that is applied in the review of a jury's findings. Although the rule is time-honoured, it may in practice express nothing more than a truism to the effect that joint findings of a referee and circuit judge should be entitled to great respect, especially in view of the fact that they were able to view the witnesses, judge their credibility, etc.[38] It would be a mistake to confer too great restrictiveness on

34. *West v. Sowell*, 237 S. C. 641, 118 S. E. 2d 692 (1961); *Green v. Bolen*, 237 S. C. 1, 115 S. E. 2d 667 (1960); *Hucks v. Sellars*, 236 S. C. 39, 113 S. E. 2d 753 (1960).

35. *Selell v. Hyder*, 229 S. C. 480, 93 S. E. 2d 637 (1956); *Reese v. National Surety Corp.*, 224 S. C. 489, 80 S. E. 2d 47 (1954); *Sanders v. State Highway Department*, 212 S. C. 224, 47 S. E. 2d 306 (1948).

36. 236 S. C. 606, 115 S. E. 2d 288 (1960).

37. See also *Alderman v. Alderman*, 178 S. C. 9, 181 S. E. 897, 105 A. L. R. 102 (1935); *Young v. Levy*, 206 S. C. 1, 32 S. E. 2d 889 (1945).

38. See *Lee v. Lee*, 237 S. C. 532, 118 S. E. 2d 171 (1961), discussed infra.

this rule alone, but viewed as a logical extension of the Holmesian principle of judicial restraint in review it may well serve a useful purpose.

C. *Matters Not Raised in Court Below*

The Supreme Court of South Carolina on two separate points, again stated its well established rule that it would not consider questions which were not raised before the court below and were not included as additional sustaining grounds, *Freeman v. King Pontiac Co.*[39]

In the case of *Carolina Amusement Co. v. Martin*[40] the Supreme Court held that the State's Blue Laws were constitutional. The Court refused to consider the question of whether these Statutes denied equal protection of the laws to the appellants, since this question was not passed upon by the lower court and was not raised by any of the exceptions.

In an interesting case concerning the South Carolina "Right-to-work" Law, the Court refused to pass upon the issue of exclusive Federal jurisdiction as raised by demurrer, since the trial court had not passed upon that issue, the demurrer having been sustained on other grounds, *Branham v. Miller Electric Co.*[41]

The case of *Green v. Green*,[42] significant in the field of trusts, also contains statements by the Court to the effect that issues not passed upon by the trial judge are not properly before the Court for review.

In *McElmurray v. American Fidelity Fire Insurance Co.*[43] the respondent was hoist upon his own petard. In the trial court he had sought to establish his case upon an agency relationship allegedly existing between his vendor and the defendant. A part of his brief was addressed to the correctness of the decision below in this regard. In argument he attempted to deny the agency relationship. The Court refused to allow this reversal of precept, even though the argu-

39. *Freeman v. King Pontiac Co.*, 236 S. C. 335, 114 S. E. 2d 478 (1960).
40. 236 S. C. 558, 115 S. E. 2d 273 (1960). See 81 Sup. Ct. 1914 wherein appeal from this case was dismissed by the United States Supreme Court.
41. *Branham v. Miller Electric Co.*, 237 S. C. 540, 118 S. E. 2d 167 (1961).
42. 237 S. C. 424, 117 S. E. 2d 583 (1960).
43. 236 S. C. 195, 113 S. E. 2d 528 (1960).

ment could conceivably have been fitted into one of respondent's additional sustaining grounds. In any event, the entire matter was concluded by a stipulation in which it was stated that notice was given by the defendant to the plaintiff.

D. *Abandonment of Exceptions*

Gowan v. Thomas[44] was a decision restating the South Carolina rule that funeral expenses are not recoverable in an action under the Survival Act.[45] This accords with the overwhelming majority view.[46] The Court noted that exceptions which have not been argued will be treated as abandoned and will not be passed upon by the Court.

In an earlier case,[47] the Court had held that under Supreme Court Rule 8, Section 2, an exception not argued is deemed abandoned.

E. *Non-Prejudicial Error*

In the case of *Childs v. Allstate Insurance Co.*[48] the Supreme Court refused to inquire into the propriety of certain instructions by the trial judge because the Court felt that the respondent was entitled to a directed verdict under the undisputed facts. Any error would, therefore, have been non-

44. 237 S. C. 198, 116 S. E. 2d 761 (1960).

45. CODE OF LAWS OF SOUTH CAROLINA, Section 10-209 (1952).

46. See Annot. 7 A. L. R. 1355, also Annot. 163 A. L. R. 253 at 260. While there can be no question that the almost unanimous rule is in accord, it has always seemed an anomaly to the author. The rule is always rationalized on the basis that only damages which the decedent could have recovered had he survived are properly recoverable under the Survival Act. Obviously the decedent would have had no funeral expenses had he survived, but it seems that the simplicity of this point may have misled the majority of courts. In the principal case, the Court passes the point with what almost amounts to flippancy but with very little logic. It seems that the proper rationale would allow the estate to recover for debts which it is responsible for. Clearly the assets of the estate are liable for the funeral debts. Many interesting problems arise if the question is considered in depth. For example, any recovery under the Wrongful Death Act may not be reached by creditors of the estate. If there has been a recovery under the Wrongful Death Act including funeral expenses, could the undertaker reach this fund to satisfy his bill if the estate is insolvent? Also, recovery under the Wrongful Death Act is for the benefit of the designated statutory beneficiaries. If the decedent has left a Will naming different beneficiaries, will the share of the statutory beneficiaries or the share of the testamentary beneficiaries be responsible for and lessened by the funeral expenses? Will this be affected by the fact that recovery for funeral expenses is proper only under the Wrongful Death Act? It seems to the author that the recovery should belong to the party who will ultimately be responsible therefor.

47. *Hucks v. Sellars*, 236 S. C. 239, 113 S. E. 2d 753 (1960), citing *Saxon v. Saxon*, 231 S. C. 378, 98 S. E. 2d 803 (1957); *State v. Hollman*, 232 S. C. 489, 102 S. E. 2d 873 (1958).

48. 237 S. C. 455, 117 S. E. 2d 867 (1961).

prejudicial. The Court cited the rule from *Mitchell v. Leech*[49] to the effect that any error of the trial judge "was not prejudicial to the appellants, for his charge gave the jury the opportunity of finding against the plaintiff upon a question of fact that should not have been submitted to them."

F. *Matters Appealable*

In the case of *Tate v. Oxner*,[50] the Supreme Court again held that an order refusing to strike certain allegations from the Complaint as irrelevant and redundant was not presently appealable.[51] Two exceptions have been recognized to this rule. When the motion to strike is in the nature of a demurrer, the decision of the trial judge may be immediately appealed.[52] The pleading in the principal case concededly contained remaining allegations which stated a cause of action and, therefore, this exception was not applicable. Such an order may also be presently appealed where there is an independent appealable issue.[53] This exception is rationalized on the grounds that it will prevent multiple and unnecessary appeals. It did not apply in the present case. In dicta, the Court also repeated from an earlier decision to the effect that the adverse decision of the trial judge on such a motion does not prevent the moving party from efforts to exclude testimony in support of the questioned allegations, nor are his rights prejudiced thereby.

49. 69 S. C. 413, 48 S. E. 290, 66 L. R. A. 723 (1903).

50. 236 S. C. 313, 114 S. E. 2d 225 (1960).

51. See the earlier case of *Sparks v. Dew and Sons*, 230 S. C. 507, 96 S. E. 2d 488 (1957), and numerous cases cited therein.

52. *Thomas v. Colonial Stores, Inc.*, 236 S. C. 95, 113 S. E. 2d 337 (1960). It should be noted that this exception applies even though a separately stated cause of action is contained in the pleading. In such cases, if the Motion to Strike is such that a favorable ruling thereon would result in the dismissal or striking of any complete cause of action in a pleading, its denial is the proper subject of an interlocutory appeal.

53. *DePass v. Piedmont Interstate Fair Ass'n.*, 217 S. C. 38, 59 S. E. 2d 495 (1950), cited by the Court in the principal case is not absolutely in point, since in that case the Court noted that ". . . the motion is in the nature of a demurrer to a substantial portion of respondent's claim." The leading modern authority in this State appears to be *Rice Hope Plantation v. S. C. Public Service Authority*, 216 S. C. 500, 59 S. E. 2d 132 (1950), wherein the Court states, "[w]e have here a single order from a part of which an appeal admittedly will lie, but it is manifest that the entire order should be considered upon this appeal . . . ." In that case, however, the Court speaks of the necessity that all phases of the order be passed upon to avoid confusion at trial and, further, that the merits of the cause were involved in the order before the Court. It would seem that if the rationale of this exception to the general rule of non-appealibility is to prevent the necessity of multiple appeals, these further requirements would not be necessary.